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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-198

SUPREME COURT OF VIRGINIA, et al.,

Appellants,

v.

CONSUMERS UNION OF THE UNITED STATES, INC. et al.,

Appellees.

On Appeal from the United States Distict Court
for the Eastern District of Virginia

APPELLANTS' REPLY BRIEF

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CONSUMERS UNION OF THE UNITED STATES, INC. et al., Appellees.	

APPELLANTS' REPLY BRIEF

I.

THIS CASE INVOLVES NO INTENTIONAL VIOLATION OF CONSTITUTIONAL RIGHTS OR DENIAL OF RELIEF TO CONSUMERS UNION.

The principal arguments in the Appellees' brief proceed upon facts not involved in the instant case. There is no suggestion here that Appellants are "judges who intentionally or wantonly violate constitutional rights." (Appellees' Brief, p. 7.) Nor is the Virginia Court claiming an immunity which would deny an aggrieved party redress for deprivation of a constitutional right.

A.
The Virginia Court Took No Action
Contrary To Any Right Of The Plaintiffs.

The only transgression alleged against the Virginia Court is that it promulgated a Rule--expressly within its authority--limiting advertising by Virginia lawyers. The Virginia Supreme Court does not serve as the prosecutorial agency for the enforcement of its rules. Nor is there any evidence, apart from the existence of the Rule itself, that either Appellees or any lawyer of the Commonwealth had been subjected to, or threatened by, Appellants with prosecution for the violation of the Rule. The proposed sanction, the award of attorneys' fees, is asserted purely as punishment for the promulgation of a Rule that clearly appeared to be valid when it was promulgated. When this Court changed the prevailing law in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), all the defendants in this case timely acquiesced in the nonenforcement of the Rule--although such acquiescence was hardly necessary to prevent enforcement of the Rule after that decision.

There was no judicial action by the Justices of the Supreme Court of Virginia that could be described as "intentionally or wantonly violat[ing] constitutional rights." Indeed, the only recalcitrance suggested by the court below was the failure of the Virginia Court to change the rule as quickly as the District Court felt desirable. But this ground for supporting the imposition of the monetary penalty is specifically eschewed by the Appellees. Appellees' Brief, pp. 39-43.

B.
Plaintiffs Were Denied No Redress
For A Constitutional Wrong

There is no basis for Appellees' argument that prospective equitable relief is necessary in order to afford any avenue of redress. The fact is that this case involves no issue of prospective actions at all; the fee award was made because of past actions. Consumers Union was able to obtain the relief it sought. It could have obtained the same relief by proceeding in a different fashion.

The fact is that the Virginia Court was not a real party in interest. Judge Friendly's decision in Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F.Supp. 117, 124 (S.D. N.Y. 1969) noted that the New York Court of Appeals was no more a necessary party than a legislature which adopts a statute. The judges who were parties to the suit were lower court judges who were applying a facially valid rule in an unconstitutional fashion.

Of course, one of the purposes of judicial immunity is to free the judiciary from collateral attacks resulting from changes in the case law. Litigants are generally limited to the relief available through an appeal rather than by suit against the Court. In bar disciplinary cases, for example, the federal remedy of an aggrieved party is through an appeal to this Court from the state's highest Court. See Schware v. Board of Bar Examiners, 353 U.S. 222, 248 (1957); Konigsberg v. State Bar of California, 353 U.S. 252 (1957). Theard v. United States, 354 U.S. 278 (1957). Hence, there is no apparent policy reason for persons challenging state bar rules to derive their remedy by federal suits against the high court of a state rather than by petitions to that court with

an appropriate appeal to this Court on questions of federal right.

Nor does the award of attorneys' fees fulfill any constitutional right of a successful litigant. Awards of attorneys' fees are authorized for the purpose of encouraging litigation. The enactment of 42 U.S.C. § 1988 was in response to the ruling of this court in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1970). Its purpose was to alter the traditional American rule of practice by providing a statutory basis for attorneys' fees. The act intended the creation of no new substantive rights. S.Rep. No. 94-1011, 94th Cong., 2d Sess. 7 (1976).

Appellees denigrate the importance of judicial independence from collateral attack. Appellees' Brief, pp. 15-16. They speak against hundreds of years of history that distinguish between the propriety of correcting judicial error by appeal and the impropriety of "correcting" judicial error by collateral litigation that would make judges responsible to others than the courts charged with reviewing them.

Furthermore, an award of attorneys' fees has an equal or greater inhibiting effect than an award of damages. Even the bare possibility of intimidation of the judiciary warrants full immunity against an attorneys' fees award. See Imbler v. Pachtman, 424 U.S. 409, 422-523 (1976); Pierson v. Ray, 386 U.S. 547, 554 (1967).

II.

THE EXERCISE OF A COURT'S INHERENT RULEMAKING POWER IS NOT AN ADMINISTRATIVE ACT SUBJECT TO EQUITABLE RELIEF.

The exercise of the Virginia Court's rulemaking authority was an exercise of its inherent power over its Bar. "This power has been recognized and enforced ever since the organization of courts, and the admission of attorneys to practice therein." Ex parte Bradley, 74 U.S. (7 Wall.) 364, 374 (1869). See Brown v. Supreme Court of Virginia, 359 F.Supp. 549, 554 (E.D. Va. 1973), aff'd 414 U.S. 1034 (1973); Ex parte Fisher, 33 Va. (6 Leigh) 619 (1835); Button v. Day, 204 Va. 547, 553, 132 S.E.2d 292, 297-298 (1963).

While there may be a basis upon which to dispute whether the Supreme Court's enactment of rules governing its Bar is deemed a "judicial" or "legislative" act, the promulgation of a rule clearly falls within the power which the Court inherently possesses. It involves the discretionary power of the Court to frame a rule of law. Thus, it is not merely an administrative[1] or ministerial act. See Brown v. Supreme Court of Virginia, supra, 359 F.Supp. at 554. Though the opinion of the majority below seems to rest on the assumption that the rulemaking power was judicial

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[1]The Supreme Court of Virginia did not act in the same capacity as did the judges in the cases relied upon by Appellees in their argument that a court's administrative duties take it outside the scope of judicial immunity. Appellee's Brief at 25-26. Unlike the actions of those courts, the power of the Virginia Court is inherent to it and part of its judicial powers. It is not merely a legislative delegation of duties generally foreign to the function of a court.

in nature[2] and addressed itself to judicial immunity on that ground, the dissent treated the rulemaking function as legislative, and would have applied legislative immunity. For purposes of this case, it does not matter which--legislative or judicial immunity--is invoked, the result should be the same.

Those cases relied upon by Appellees for the proposition that judicial immunity does not protect judges in the performance of their duties from equitable relief --a proposition this Court has never endorsed--simply reiterates the argument that judicial immunity applies only to actions for damages. But the relevant decisions of this Court may be read to bar equitable as well as legal actions against judges acting in a judicial capacity--especially when such actions result in monetary sanctions. See Stump v. Sparkman, 435 U.S. 345, 355 (1978); Pierson v. Ray, supra at 555, n. 9 (1967); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1871).[3] Mitchum v. Foster, 407 U.S. 225 (1972) is not contrary because it involved no action against a judge; the decision recognized that the principles of equity, comity and federalism which restrain a federal court when asked to enjoin a state court proceeding were inapplicable on the facts of the case.

Appellees err in arguing that legislative immunity is not available to those performing a legislative function. It is not limited only to legislators. See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979). Butz v. Economou, 438 U.S. 478 (1978) justifies looking to the function, not the title, in determining the immunity to be afforded a government official.

Appellees erroneously construes the effect of Lake Country Estates. First, since the power exercised by the Supreme Court of Virginia is an inherent power which can be exercised independent of any act of the Virginia General Assembly, there is no basis for the contention that all administrative rulemaking bodies could claim legislative immunity. Second, though the Ninth Circuit did allow prospective declaratory and injunctive relief in Lake Country Estates, this relief was against those officials in their executive capacities, not their legislative capacities. Jacobsen v. Tahoe Regional Planning Agency, 566 F.2d 1353, 1360, 1366 (9th Cir. 1977). Therefore, this Court's affirmance of the Ninth Circuit decision, does not prohibit the grant of full legislative immunity from all suits to the Supreme Court of Virginia.

III.

THE IMMUNITY OF THE VIRGINIA COURT IS CONSTITUTIONALLY BASED.

Where an immunity is essential to the performance of a branch of government, it has been

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[2] Lathrop v. Donohue, 367 U.S. 820 (1961), cited by Appellees for the proposition that promulgating bar rules is not a judicial act, involved a question of appellate jurisdiction, wherein it was noted that the rules had sufficient legislative character to be considered as "statutes." The court which had promulgated the rule was not a party to the suit.

[3] Brief on Behalf of the Appellants, at 7-13.

held to be incorporated in the Constitution. For instance, "[n]owhere in the Constitution...is there a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a president's powers, it is constitutionally based." United States v. Nixon, 418 U.S. 683, 711 (1974).

The Supreme Court of Virginia has recognized its power to regulate the bar is an essential incident of its constitutional investment of the judicial power of the Commonwealth. Button v. Day, supra. See Tenny v. Brandhove, 341 U.S. 367, 375 (1951). Such an important constitutional power and the immunity necessary to insure its free exercise are, thus, essential to a republican form of government and therefore guaranteed by Article IV, § 4 of the Constitution. Cf. Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966). Similarly, whether legislative immunity derives from the Speech and Debate Clause or from the common law (as contended by Consumers Union) is immaterial. The controlling fact is that it is fundamental to our scheme of government. The power to set compensation of state employees is an essential function of government immune from encroachment by Congress. National League of Cities v. Usery, 426 U.S. 833 (1976). The independence of the judiciary from awards of attorneys' fees must be even more fundamentally an essential aspect of state sovereignty.

IV.

THE SPECIAL CIRCUMSTANCES DEFENSE PRECLUDES AN AWARD OF FEES AGAINST THE COMMONWEALTH.

Consumers Union argues, for the first time on

appeal, that fees may be awarded against the Commonwealth under Hutto v. Finney, 437 U.S. 678 (1978). However, this is not a case where, as in Hutto, state officials were liable for fees, so that an award against the state treasury also was appropriate. Here, the defendants were not subject to a fee award in the first place, so no basis exists for awarding fees against the treasury. The "special circumstances" defense would never be available if fees were to be automatically awarded against the treasury without first finding a defendant liable for fees.

Until the decision of the District Court, the Virginia Bar was in the process of concluding a case which was left without meaningful issues by the decision of this Court in Bates. The Attorney General of Virginia had held the rule unenforceable insofar as it conflicted with Bates, and the Bar was formulating new advertising rules. None of the defendants had any intention of enforcing any rule contrary to Bates. The only act by the Virginia Court adverse to Consumers Union had been the adoption--prior to Bates--of an advertising ban which had been customary since 1908. 470 F.Supp. at 1074.

Thus, the reason the special circumstances doctrine is applicable to require denial of an award of attorneys' fees against the Virginia Court is not merely that it acted in good faith, but also it acted in accord with the law when it adopted a rule for protection of the public, never taking any other action adverse to the plaintiffs. If the District Court had applied proper factors in examining whether special circumstances existed, there would have been no basis for an award of attorneys' fees against the Virginia Court.

V.

THE VIRGINIA COURT HAS NOT WAIVED ITS DEFENSES.

Appellees continue to argue that the judicial immunity defense to the fee award is improperly raised on appeal (Appellees' Brief at 40.) As the District Court Opinion makes clear, the Virginia Court, in timely fashion prior to the District Court's decision, raised the issue of judicial immunity from an award of attorneys' fees under 42 U.S.C. § 1988. 470 F.Supp. at 1059. Moreover, the issue of the court's immunity from declaratory or injunctive relief under 42 U.S.C. § 1983 was presented to the District Court on petition for rehearing. Because the Virginia Court had no notice the District Court would attach relevance to the delay in amending the rule, or would assume the delay was due to bad faith, the petition for rehearing was the earliest reasonable opportunity to raise the issue of immunity from judgment. Certainly, the issue was presented in a manner which permitted a proper ruling thereon. A party need not plead immunity as long as the issue is presented to the trial court in circumstances which enable the court to rule on it without prejudice to the other party. Eslinger v. Thomas, 476 F.2d 225, 228 (4th Cir. 1976).

Immunity defenses are jurisdictional and can be raised on appeal for the first time or can be raised by this Court sua sponte. See Edelman v. Jordan, 415 U.S. 651, 678 (1974); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979).

Moreover, the Bar and the Court had no real reason to proceed differently. The State defendants proposed an order (1) declaring the

directory valid for publication, and (2) enjoining enforcement of the rules and regulations "insofar as such regulations prohibit lawyers practicing in the Commonwealth of Virginia from providing such information to plaintiff for publication." (App. 35.) This proposed a limited ruling, found no violation of 42 U.S.C. § 1983, called for a limited injunction not significantly different from that sought in the complaint, and provided for no award of attorneys' fees. The District Court was exercising jurisdition pursuant to 28 U.S.C. § 1343(3), under which a prevailing party is not entitled to an award of attorneys' fees.

If the District Court had entered the Order requested, the State defendants would have been satisfied to let this protracted litigation terminate. But that did not occur. Rather the District Court struck down the entire rule. Much of the rule was valid facially, such as the ban on false advertising. The District Court found that the defendants, including by implication the Virginia Court, had violated 42 U.S.C. § 1983, although no act of the court was cited as the basis for that finding. Relying on facts assumed, but not in evidence, the District Court awarded attorneys' fees because of the Virginia Court's failure to amend the rule. On petition for rehearing the Virgina Court offered to provide evidence demonstrating the inaccuracy of the assumed facts.

CONCLUSION

At issue in this case is whether the Supreme Court of any of the several states can properly exercise inherent judicial authority. It involves no question of federal supremacy; it presents no conflict between the usual functions of a branch of

government and individual rights under the Constitution. But this case will determine whether the independence of the judiciary will be jeopardized or will be preserved.

Chief Justice John Marshall best articulated the question at issue here during the Virginia Convention of 1829-30, when he said, "The greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt or a dependent judiciary." A judiciary subject to assessment of attorneys fees in today's practice would soon be a dependent judiciary.

There is no blinking the conclusion that without reversal by this court no judge can be free of harassment in exercising any judicial function. The threat of such economic sanctions would skew countless decisions, conclusions, findings and functioning of our courts. It would unhappily alter the exercise of judicial power by both the states and the federal government to the great prejudice of the citizenry.

The doctrine of judicial immunity should not be encroached upon. It is a necessity in a well ordered system of jurisprudence; needful in order to avoid constant intimidation.

The judgment below should be reversed.

Respectfully submitted,

THE SUPREME COURT OF VIRGINIA
and

THE HONORABLE LAWRENCE W. I'ANSON,
Appellants.

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CERTIFICATE

I, Marshall Coleman, Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States, and counsel for The Supreme Court of Virginia and the Chief Justice, hereby certify that three copies of the foregoing have been served upon each counsel of record for the parties herein by mailing same, first-class postage prepaid, this 13th day of February, 1980, as follows:

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